

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,) CRIMINAL ACTION FILE
v.) NO. 1:18-CR-00181-MLB
)
BENJAMIN JENKINS,)
)
Defendant.)
_____)

BEFORE THE HONORABLE MICHAEL L. BROWN
TRANSCRIPT OF PROCEEDINGS
SEPTEMBER 17, 2019

APPEARANCES:

For the Plaintiff: OFFICE OF THE U.S. ATTORNEY
(By: Paul Jones and
Libby Skye Davis)
For the Defendant: FEDERAL DEFENDER PROGRAM, INC.
(By: Sarah M. Timmers)

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1 would talk about the way that would proceed. We can talk about
2 anything else anybody wants talk to about, too.

3 Any pressing issues that either party wants to bring
4 up?

5 MR. JONES: Not a pressing issue, Your Honor, but
6 just to make a record for it, so there is a written record of
7 it. The government had extended a plea offer to Mr. Jenkins,
8 he rejected the offer, so -- which is why we're going to trial.
9 That's all I just wanted to get on the record, Your Honor.

10 THE COURT: Anything you want to say about that,
11 Ms. Timmers?

12 MS. TIMMERS: No, Your Honor.

13 THE COURT: Is there still any chance of this case
14 being resolved?

15 MR. JONES: Our plea offer expired a few weeks ago,
16 Your Honor, so not under -- not what was previously offered. I
17 don't -- I don't anticipate this being resolved without a
18 trial, Your Honor.

19 MS. TIMMERS: Well, hope springs eternal for defense
20 counsel.

21 THE COURT: Okay. All right. All right. So let's
22 just get maybe started with the nuts and bolts and then we'll
23 get to the more substantive information.

24 I plan on seating a jury of 14, which gives us two
25 alternates to be released during the deliberation. To get

1 there, I plan on bringing in 40 jurors. Does anybody think
2 that will not be enough?

3 MR. JONES: This, Your Honor, will be I think my
4 fifth trial, fourth or fifth trial involving a charge of child
5 sexual exploitation, the first one involving producing the
6 child pornography. The last one I had, I think Judge Batten
7 brought in that same number of jurors. We were able to select
8 a jury from that. I bring that up because previously, my first
9 trial was 12 years ago. Judge Thrash had a very large number
10 of jurors and so many of them said that there's no way they
11 could ever sit on this type -- on that type of trial, but as
12 the years have gone by and since I've had more trials, it seems
13 that the number of people who just adamantly say because of for
14 whatever reason that there is no way they could ever sit on
15 that type of trial has shrunk. I think 40 should be enough, if
16 it's possible to bring in maybe just a few more just to be
17 safe, that might be good in case we do have some extra jurors
18 who say they do not want to deal with this type of subject
19 matter.

20 THE COURT: So we have six strikes and ten strikes,
21 right?

22 MR. JONES: Yes, Your Honor.

23 THE COURT: We need 14, that gets us to 30. And that
24 gives us 30 people to be excused for cause. I think he's
25 probably right.

1 COURTROOM DEPUTY: You need two additional for the
2 alternates, so it would be 16 plus 12, which is 28.

3 THE COURT: Right.

4 COURTROOM DEPUTY: Plus two alternates plus two
5 strikes, which is 32.

6 THE COURT: 32. You're right. So that only gives us
7 a cushion of eight. We'll bring in more jurors than that.

8 We will seat the jurors on these rows starting here
9 (indicating) and then going over there (indicating). The way
10 that I typically do it is I will read out to the jury or the
11 panel some introductory information, then I provide to them
12 basic qualifying questions. I think they're on the website.
13 Have y'all seen our qualifying questions?

14 MR. JONES: Yes, Your Honor.

15 MS. TIMMERS: Yes.

16 THE COURT: Okay. There's nothing special about
17 them. If anybody wants something added to it, let me know and
18 I will do so. Of course, that means I have to have a witness
19 list at least by that morning of all potential witnesses so we
20 can qualify the jury against the witness list. I know you-all
21 will be giving it earlier than that, but I need to make sure
22 I've got a very comprehensive witness list to qualify the jury
23 against. If you want to add anything to the qualifying
24 questions, I'm happy to do so, just let me know.

25 Before I do the qualifying questions, I typically

1 read to them some background information about the case.

2 Have we provided that to them?

3 COURTROOM DEPUTY: Yes, sir.

4 THE COURT: Have you-all seen the case summary?

5 MR. JONES: Yes, Your Honor.

6 THE COURT: Does anybody have any objections to that?

7 MR. JONES: The government doesn't, Your Honor.

8 THE COURT: I just think it's important to provide
9 them that context so that when they're asking the background
10 questions or what I call the qualifying questions, they will
11 get it.

12 Then we will have each person, going down the row,
13 will stand up and will go through the background questions
14 question by question. Okay? They each have a copy of it. The
15 purpose of that is it loosens them up a little bit for talking
16 with you-all if just each one of them stands up and says a
17 little bit about themselves. If there's something you don't
18 want on here, let me know, and I'll take that question off. If
19 there's something you want me to put on so that you don't have
20 to ask it, let me know that as well and I'll add that. It's
21 just it really gets the jurors a little bit loosened up to when
22 you-all ask them questions, you might actually get responses
23 rather than blank stares. Okay?

24 After that, I will allow you-all the time you want to
25 ask your questions. I don't really review the questions that

1 you-all want to ask. Just keep in mind it's a time to
2 determine whether these folks are qualified for the jurors, not
3 to test out themes, preview or get people to agree to
4 something. I've had a case recently, a civil case, where
5 somebody tried to get people to agree to what a contract would
6 be, and, you know, that's not the time for that. But I think
7 y'all probably know what to do.

8 I don't put time limits on how long you want to spend
9 on doing it. You now, you-all kind of know better than I do.
10 And you might have a reason to go longer than you think you
11 will. So I don't put any time limits on that.

12 At some point during the morning, we will have the
13 jury go out and we will do for-cause challenges. I'll also of
14 course offer them the opportunity of giving us information more
15 privately, so that will be an opportunity.

16 So at that break, what I typically do is I have the
17 people who have said they'd like to speak private stay right
18 out front and then bring them back in one at a time, finish up
19 with what we've got to get from them, let them go back out and
20 then we'll do for-cause challenges. Okay?

21 Then I'll give y'all time to talk amongst yourselves
22 about how you want to exercise your strikes. I will bring the
23 jury back in and I will probably give you another couple
24 minutes now that you can actually see them face-to-face. I
25 always find that if you do it on paper, it's harder than if you

1 see them and you can really get a feeling for what you want, so
2 I'll probably give you a couple more minutes, five or six more
3 minutes with them in the courtroom before you start exercising
4 your strikes.

5 The exercising of strikes, I would anticipate we
6 start with the government and go back and forth. You can
7 strike forward, you can strike backwards, you can strike in any
8 order you want, it makes no difference to me. You don't have
9 to use all of your strikes. The first 12 jurors will be our
10 jury, and then we'll pick from the next four for our alternates
11 or six for alternates?

12 COURTROOM DEPUTY: Four.

13 THE COURT: Four for alternates okay? Make sense?

14 MR. JONES: It does, Your Honor.

15 THE COURT: Any questions about that process?
16 Request to do it a different way, anything like that? I'm not
17 wedded to it, it's just the way I like doing it. I'll do it
18 any way y'all want. Well, most any way you want.

19 MR. JONES: No issues from the government,
20 Your Honor.

21 THE COURT: Okay. That's kind of what I wanted to
22 talk about that. How many days do we expect this case to go?

23 MR. JONES: We declared it a medium case, Your Honor,
24 I think, but it's definitely not going to go a full two weeks.
25 We think it's probably going to spill a little bit into the

1 second week, especially now that we're starting on Tuesday, but
2 just out of an abundance of caution, I'm going to say that we
3 would expect that it's at least going to go to the jury by the
4 end of that Tuesday, October 8th.

5 I have had issues with underestimating trials in the
6 past, which I know is a dangerous part of the Court, but I
7 would think with six trial days, we're definitely going to get
8 it done then, or at least have it to the jury by then.

9 THE COURT: Yes. I also don't, by the way, put time
10 limits on openings and closings. She's looking at me now
11 because the last time I didn't do that, last week somebody went
12 on for 89 minutes, I think it was. I don't know what he was
13 looking at when he was talking, because the jury was clearly
14 done listening after about 45 minutes. I don't think y'all
15 would do that. I mean, this is a big issue, it's a very
16 serious case. If you want to take five more minutes or talk
17 slower, it makes no difference to me. We ought to just take
18 the time we need to do it. So I don't put time limits on it,
19 everybody is telling me to put time limits on it, and maybe
20 some day I'll put time limits on it. If that guy is ever back
21 in court, there's going to be time limits, but other than that.
22 Okay? Any questions or thoughts about the process? Yes?

23 MS. TIMMERS: Your Honor, this is just kind of a
24 scheduling thing. I know that Mr. Jones said he expected the
25 trial to go over into the next week. I do have -- it's a small

1 hearing that's scheduled in front of Judge Walker at 10:00 on
2 the 7th that was just scheduled today, it was just a bond
3 revocation hearing. Anyway, I just wanted to know if this
4 Court would allow me to do that hearing if this trial does --

5 THE COURT: Why don't we see how it is. We'll work
6 it out. It's a bond hearing for somebody?

7 MS. TIMMERS: A revocation hearing in front of
8 Judge Walker.

9 THE COURT: It's not one of my cases, by chance?

10 MS. TIMMERS: Okay.

11 THE COURT: We'll work it out with Judge Walker. If
12 we have to have a short recess, we'll do that. It makes no
13 difference. Okay?

14 You know, I try not to have a lot of bench
15 conferences, if we can avoid it. I think the jury wants to
16 have testimony most of the time. I typically start around
17 9:00, and we take a break halfway through the morning for 15
18 minutes or so and then we take a lunch break and then the same
19 thing in the afternoon.

20 You know, we can start at 9:30, if you'd prefer, but
21 end around 5:00 or 5:30. What I typically ask is that you
22 anticipate issues. It's real easy for us to come in earlier in
23 the morning or stay later at night, that's not a big deal.

24 Where are we on jury instructions?

25 MR. JONES: We have not filed any, Your Honor. And

1 does the Court prefer we get together and file joint and if
2 there is any issue that we don't agree on, then direct that to
3 the Court?

4 THE COURT: I think the way to do it is to redline
5 them. Right? I think that if you can provide -- if one party
6 wants to provide their requested instructions to the other side
7 and then the other side can then in a redline either object and
8 strike out or insert what they want instead, if we're all
9 working off the same document, it just makes it so much easier.
10 Does that make sense?

11 MR. JONES: That does, Your Honor.

12 MS. TIMMERS: Redlining meaning as in cross out and
13 italicize?

14 THE COURT: Yeah, like, you know, the function on
15 Word that's -- it's just track changes I guess it's called.

16 MS. TIMMERS: Okay.

17 THE COURT: So that way, you know, it's real easy for
18 to us see what the disputes are, and we're all then working
19 from one document. Does that make sense?

20 MS. TIMMERS: Yes.

21 MR. JONES: Yes.

22 THE COURT: And if we file, if whoever does it, the
23 first drafter files their draft and then whoever puts their
24 objections files their draft, we have a record of what the
25 objections were, and we can just keep filing those as we go

1 along. Does that make sense?

2 MR. JONES: Yes, Your Honor.

3 MS. TIMMERS: I think so.

4 THE COURT: What's the problem?

5 MS. TIMMERS: No. No. I'm just -- you're saying
6 redlining so, for example, Mr. Jones would send me what he
7 thinks and then I redline and then we send it back to him?

8 THE COURT: Yes.

9 MR. JONES: To see if I object to any of her changes?

10 THE COURT: Yes.

11 MS. TIMMERS: And then the redlining gets filed?

12 THE COURT: Yes.

13 MS. TIMMERS: Okay.

14 THE COURT: So he would start off with probably the
15 pattern charges and then you would add the charges that you
16 want to his and it would show up, if you did the track changes
17 as you add them. And then you would cross off whatever you
18 don't want in provisions and you would change it and we'd have
19 a record of that, right? And then you would send it back to
20 him and he might be like yeah, that's fine with me and accept
21 it. And then it would be very clear where the disputes are.
22 Does that make sense?

23 MS. TIMMERS: Yes. Yes.

24 THE COURT: It's, you know, a long time in private
25 practice, it's how almost every brief was done so you can

1 figure out what everybody thinks should be said. So I find it
2 just easier than having two totally separate documents that I'm
3 trying to figure out where they're the same and where they're
4 different, it's just a lot harder doing it that way. Okay?

5 And what I would suggest is that we have that done by
6 like the second day of trial, maybe the third day of trial, but
7 well before so that we can address these at a term I coined
8 several years called convenient time. Convenient time means
9 that there is time in the workday for us all to work on things,
10 not that you-all get to work at during the workday and I have
11 to work at after hours, okay? That's a copyright 2005 by me
12 term.

13 All right. Anything else in that regard?

14 MR JONES: No, Your Honor.

15 THE COURT: All right. So y'all want to turn to the
16 motions in limine? The first one that we can get out of the
17 way, the way you-all want to divide up the witness so that
18 Special Agent Greene, I suppose, will be publishing the items
19 at the end of the case is fine or at two different times is
20 fine with me.

21 MR. JONES: Thank you, Your Honor.

22 THE COURT: Ms. Timmers said that you're not going to
23 put the -- she was suggesting that that would somehow limit her
24 ability to use the text messages back and forth that was in her
25 sur-reply; is that right?

1 MR. JONES: I don't -- I'm not quite sure actually
2 how that would limit it, Your Honor. With the victims who will
3 be testifying, they'll probably be testifying a lot about the
4 text messages, Kik messages, Facebook, whatever platform is
5 being used to communicate, so I think there would be that
6 ability to question the witnesses about that.

7 The witnesses have -- we have met with -- spent a
8 good chunk of the country traveling around the country meeting
9 with the victims. They have all reviewed separately each one.
10 The pornographic images were copied on to a separate disk for
11 each victim.

12 THE COURT: Right.

13 MR JONES: And they've reviewed that disk in advance
14 and so they've initialed it. So we anticipate at trial that
15 they would just verify I've viewed this, I recognize it by my
16 initials and I know this contains images that I sent via Kik,
17 Facebook, whatever.

18 THE COURT: But they would be talking about the text?

19 MR. JONES: They would be testifying about that.

20 THE COURT: The text would be displayed, just not the
21 photos.

22 MR. JONES: That's correct, Your Honor.

23 THE COURT: I think that in large part addresses your
24 concern, Ms. Timmers, doesn't it?

25 MS. TIMMERS: I don't know. Well, what if I want to

1 talk about the sexts themselves, you know, the photos?

2 THE COURT: Okay. We're going to get to that in a
3 minute. Okay?

4 MS. TIMMERS: Okay.

5 THE COURT: But I think that the way you want to do
6 it by recalling the agent at the end is totally fine and I
7 don't think it was objected to. Is that right, Ms. Timmers?

8 MS. TIMMERS: That's correct.

9 THE COURT: Okay. And the other one that was not
10 objected to was closing the courtroom. I suppose that's fine
11 with me. Has anybody looked to make sure that it's okay to do?
12 I mean, we can certainly turn those big TVs that face outward,
13 we can certainly turn them this way so that nobody sees any of
14 the images, that's absolutely required. Does that accomplish
15 it? There's something about locking the courtroom door that
16 bothers me.

17 MR. JONES: I understand, and we have -- and it's
18 very rare, usually it's done if there are like sensitive
19 national security matters, terrorism, things like that.

20 THE COURT: Yes.

21 MR. JONES: I've had some judges do it, agree to it,
22 and I've had some -- one judge comes to mind who did not want
23 to do it, his response was nobody wants to see it anyway, and
24 it turned out that there was nobody in the courtroom. And this
25 might very well be the same situation, it might be a moot

1 point, because there will be nobody here.

2 It's possible that just, you know, turning off the
3 screens in the back would be -- would take care of it. We
4 would turn off our screen here. The defendant though would
5 have a right to see it, and we can't say that screen gets
6 turned off. And I kind of doubt if anybody's sitting around --
7 if there was -- if there were people here, if they could see it
8 from that screen.

9 THE COURT: Well, let's decide that we will figure
10 out how to do it then, whether it means kicking everybody out
11 or whether it just means turning around the screens that need
12 to be turned around, but certainly those images will not be
13 displayed in court other than what they have to be to meet the
14 Constitutional requirements. And nobody that's not involved in
15 this case will have any access to them in any way. Okay?

16 That's fine with me if there are people in here, we
17 just ask them to leave. I don't think that anybody would
18 object to that. It's just that something seems odd to me about
19 ahead of time deciding to do that.

20 MR. JONES: I understand. And I was kind of hoping
21 that Congress would have made it easy by passing the statute
22 giving the judges authority to do that.

23 THE COURT: Yes.

24 MR. JONES: But that hasn't happened. And as a
25 corollary, Your Honor, in order to make a record, the --

1 normally what I do is I have the agent describe what the image
2 is so that on appeal --

3 THE COURT: I know.

4 MR. JONES: -- there is -- the appellate court --
5 assuming there is a conviction, the appellate court knows
6 exactly what the images consist of. It's not a very graphic
7 description, but at least some description, so that would be
8 another factor that would go -- that the government brings up
9 just in case there are more people here than we anticipate when
10 that testimony occurs. But I'm definitely fine with waiting to
11 see what happens at the moment and we would alert the Court
12 before that happens.

13 THE COURT: I'll bet you anybody sitting in the
14 courtroom will take our hint that they ought to leave. And if
15 not, we'll make sure that they do.

16 MR. JONES: I'm sure they would. Thank you,
17 Your Honor.

18 THE COURT: Okay. All right. So the other ones, I
19 think that leaves maybe two --

20 Bennie, I left my black notebook on my desk again.
21 Thanks.

22 Where are we on -- the government filed something
23 back in August to make sure there was not going to be expert
24 testimony as to any mental illness. There was a response and
25 then there was a sur-reply that sort of didn't address the

1 issue. Where are we on that issue? Is this something we're
2 going to have to decide?

3 MS. TIMMERS: So our -- the forensic psychologist who
4 we hired, we are using her for sentencing, not for guilt or
5 innocence, so we don't need to give any notice under --

6 THE COURT: Right. Okay. Is that new to me? Did we
7 know that before?

8 MS. TIMMERS: Well, that's the reason -- I don't know
9 if you recall, but that was the reason why I asked for the case
10 to be continued out to this date.

11 THE COURT: Right. No, I saw in your pleading that
12 you said you could use it at trial or you could use it
13 sentencing only. But I didn't know if that decision had been
14 announced until now.

15 Did you know that before now, Mr. Jones?

16 MR. JONES: No, I think when the motions in limine
17 were due, Your Honor, she -- in fact, we had spoken about that,
18 the psychologist at least at that time had not at least
19 prepared a report. I'm not sure when the psychologist met with
20 Mr. Jenkins. But I wasn't aware that that was the route they
21 were going to take.

22 THE COURT: Okay. So that issue is not one that we
23 have to address.

24 So I think the one that we then have to address is
25 really just one, is that's right?

1 MR. JONES: I think there are two, Your Honor.

2 THE COURT: Oh, right. The 404(b). All right.

3 Let's talk about the victim's sexual history and what that
4 means in this case. Can somebody help me understand in this
5 case what we're talking about? Are we talking about photos
6 that these people sent to other people at other times?

7 MR. JONES: We, Your Honor, are talking about photos
8 that the victims made and the government's contention is that
9 these were made at the direction of Mr. Jenkins and sent only
10 to Mr. Jenkins. And we anticipate that there will be testimony
11 that if the photo or the video did not meet his specifications,
12 the victim would have had to redo it.

13 So this is not a case where they just have a lot of
14 photos and shipped them out and that there were multiple
15 persons. Our -- we anticipate the evidence is going to show
16 that Mr. Jenkins was the only person in contact with the
17 victims and directing them on what to do.

18 THE COURT: So what is it that you anticipate the
19 defendant might try to elicit that you want to exclude?

20 MR. JONES: That the -- if the defendant -- if the
21 victims -- I think honestly, Your Honor, what I want to
22 exclude, because I think it -- I don't know if there's a good
23 faith foundation for it and if there's relevance, any questions
24 to the victim about any -- whether they had ever sent sexually
25 explicit photos to anybody else and whether that was -- and

1 anything that related to that, like if they were in a
2 relationship and had they ever exchanged such photos when they
3 were in a relationship with, say, you know, some high school
4 boyfriend or something like that. I don't think that would be
5 relevant to the charges here.

6 Mr. Jenkins is charged with producing child
7 pornography by means of coercion. And the -- whatever else the
8 victim may or may not have done is just not relevant to his
9 guilt. So that's what the government is trying to exclude, any
10 questions asking the victims about anything similar that they
11 might have done, and including also any type of sexual activity
12 that they -- you know, whether they're sexually active with --
13 with anybody either around the time that they were in contact
14 with Mr. Jenkins, either before or after, the government just
15 does not believe that that's relevant to the charges that Mr.
16 Jenkins is facing.

17 MS. TIMMERS: Well, Mr. Jenkins sees it a little bit
18 differently. Mr. Jenkins would -- we don't know, we haven't
19 seen the victims, we haven't had a chance to cross-examine
20 them, but we don't know if they've only sent these sexting
21 photos or these sexting videos to other people or not.

22 They may have sent them to Mr. Jenkins and they may
23 have sent them to others. Mr. Jenkins should be allowed to ask
24 them about that.

25 Also since the government is alleging that

1 Mr. Jenkins coerced these young women, we should be allowed to
2 ask them about what -- how they felt that they were coerced
3 virtually into sexting, into taking a photo of themselves or a
4 video of themselves and then sharing that over the Internet.
5 That is necessary to Mr. Jenkins' defense. And Mr. Jenkins
6 does have the Sixth Amendment right to cross-examine his
7 accusers.

8 I mean, his accusers are claiming that he coerced
9 them into having them send him sexting videos and photos.
10 Well, Mr. Jenkins should be allowed to cross-examine them on
11 what coercion are they speaking of and exactly how did this
12 sexting take place and did you send these sexts to someplace
13 else. As I've stated in my briefing, this is relatively new
14 adolescent flirting and Mr. Jenkins would like to cross-examine
15 about the flirting.

16 MR JONES: And, Your Honor, to clarify one point that
17 she brought up, we anticipate -- this is something that we
18 covered with the victims. We anticipate that every victim will
19 say that they produced all the photographs and videos that will
20 come into evidence. We anticipate that they will say that they
21 were produced at the direction of Mr. Jenkins and that they
22 sent them to Mr. Jenkins and not to -- you know, our focus has
23 been on the crime, the crime alleged here, so I'm not -- and we
24 see this differently.

25 Ms. Timmers calls it sexting, we call it the case

1 extortion, and so -- I think there is still relevance to the
2 charges that he's facing. He has a right to cross-examine his
3 accusers, but it's not an unfettered right, it is circumscribed
4 by the rules of evidence and one of the rules of evidence is
5 that people cannot basically go on a fishing expedition asking
6 about -- in a case involving sexual exploitation cannot just
7 start asking all about their sexual history and anything else
8 that they may have done.

9 As long as the testimony comes out saying that they
10 produced the images at Mr. Jenkins' direction and sent those to
11 him, then I don't think that opens the door to now let's talk
12 about how many boyfriends you've had and your sexual history
13 with them and whether you've done this for any other -- anybody
14 other than Mr. Jenkins.

15 THE COURT: Let's take it a bite at a time. Things
16 like their sexual history, is that something you would want to
17 get into?

18 MS. TIMMERS: No.

19 THE COURT: Okay. There's no way that can be
20 relevant. Do we all agree?

21 MS. TIMMERS: Yes.

22 THE COURT: So then I think what it comes down to is
23 whether or not they sent photos to other people such that it
24 undermines the claim that he coerced them.

25 MS. TIMMERS: Correct.

1 THE COURT: The crime charged is inducing, enticing
2 and coercing, right?

3 MR JONES: Yes, Your Honor.

4 THE COURT: I mean if the government is going with a
5 coercion allegation -- because otherwise it seems kind of
6 irrelevant to me. If a victim is sending -- is victimized by
7 somebody else, it really makes no difference and it's not a
8 defense to a defendant that somebody else also victimized the
9 victim, it seems to me.

10 MS. TIMMERS: Mr. Jenkins isn't trying to go into
11 other victimization, it's more that Mr. Jenkins would like to
12 cross-examine these girls on how they claim to have been
13 coerced and these sexting videos or these sexting photos or
14 these sexting images, was he, in fact, the only person they
15 sent them to? Did they send them to others? Did they -- you
16 know, we don't know until we cross-examine them. We just don't
17 know. But that's certainly relevant for a jury if we have
18 complaining witnesses who sent sexts to Mr. Jenkins but then
19 also sent those same sexts elsewhere or had --

20 THE COURT: Can we call them photos or messages? I
21 don't know that the word sext is the right word. I guess you
22 could call it whatever you want in front of the jury.

23 MS. TIMMERS: Okay.

24 THE COURT: Are you talking about the same photos?

25 MS. TIMMERS: Any photos or any videos.

1 THE COURT: All right. Let's cut that in two pieces.

2 MS. TIMMERS: Oh, let me finish my thought first.

3 THE COURT: Sure.

4 MS. TIMMERS: So any photos or any videos that these
5 complaining witnesses are saying that we were coerced into
6 sending Benjamin Jenkins, we would like -- Mr. Jenkins would
7 like to cross-examine them on that, on how they claim to have
8 been coerced and where else they may have ended up, and how
9 they've been familiar with -- and also, I might as well bring
10 this up too is Mr. Jenkins --

11 THE COURT: I'm not ready for that yet. I'm trying
12 to take this a piece at a time. Okay?

13 MS. TIMMERS: Okay.

14 THE COURT: Because when you talk specific, we can
15 reach agreements or we can make a ruling. When we talk
16 generally, it's a little bit harder.

17 Mr. Jones, are we talking about instances where they
18 sent the same photo to the defendant that they sent to other
19 people?

20 MR JONES: I think that is her allegation. I have no
21 evidence, Your Honor, that the photos that we're going to be
22 putting into -- the photos and video, those files, I have no
23 evidence that those files were ever sent to anybody else after
24 they were sent to Mr. Jenkins. Now, he --

25 THE COURT: Or before.

1 MR JONES: Pardon me?

2 THE COURT: Or before.

3 MR JONES: Right. I think the testimony is going to
4 be that they produced them at his direction, so they could not
5 have been sent -- to anybody else before. And I have no
6 evidence that they were sent to anybody else afterwards. The
7 first part where she wants to question the witnesses about how
8 they were coerced, I think that's part of the -- that's one of
9 the elements, so I think that's definitely fine.

10 THE COURT: Yes.

11 MR JONES: But I think what happened afterwards, if
12 anything, it just seems like a fishing expedition and it does
13 open up the victims to -- well, really to being -- it's kind
14 of, you know, questioning their sexual morals and their
15 morality. We have -- we know that one of the persons that
16 Mr. Jenkins contacted and there were -- we're working with nine
17 victims at trial, but there were in excess -- well in excess of
18 100, and we know that one of those one hundred-plus victims was
19 later also subsequently a victim of human trafficking. And it
20 would not be appropriate, I think for -- for defense counsel to
21 ask a person in that situation, so let's talk about human
22 trafficking, so after this you just like to go out and have sex
23 with other men for money, because it would have to have
24 relevance to what he's charged with.

25 THE COURT: You're right. It has no relevance to

1 that.

2 MR JONES: And so I think that's the same thing,
3 Your Honor, anything -- you know, whether they even kept the
4 pictures and anything right now that they may have done with
5 it, I just don't think it's relevant to the charges that he's
6 facing.

7 THE COURT: Let me give you a hypothetical. If what
8 we have is only these images -- if what we have is that none of
9 these images were sent to other people --

10 MR JONES: By the victim.

11 THE COURT: -- by the victim, right, by the victim,
12 then the only question then becomes were there other photos
13 they took at another time, and if so, under what circumstances.
14 Because I think what Ms. Timmers is saying is that if somebody
15 else was not coercing to get it, that might be relevant to her
16 claim that there was no coercion here.

17 Is that right, Ms. Timmers?

18 MS. TIMMERS: Yes, Your Honor.

19 MR JONES: But I don't know if Ms. Davis wants to
20 interject her point.

21 THE COURT: Go ahead. You can argue too. I'd like
22 to hear it. I don't abide that only one person can talk rule.

23 MS. DAVIS: That's good to know, Your Honor. You
24 know, I think Ms. Timmers is going to have an opportunity at
25 least to really drill down into this idea of coercion with

1 respect to each victim's interaction with Mr. Jenkins because
2 each one has a different story.

3 THE COURT: Right.

4 MS. DAVIS: And not every relationship began
5 coercive, Your Honor. And I call -- and I use the word
6 relationship loosely here. Each one of their interactions with
7 Mr. Jenkins, some of them began in ways where it was an online
8 flirting situation.

9 So Ms. Timmers is going to have plenty of opportunity
10 to truly drill down about what made you feel like you had to do
11 this or what made you feel like Mr. Jenkins was telling you how
12 to pose or what to use during masturbation. That is absolutely
13 something that she's going to have every opportunity to go
14 into. And I think that the victims are going to be very
15 forthcoming about, in some instances, where there was an arc of
16 this interaction.

17 THE COURT: So it just seems to me if these women
18 were coerced by the defendant in this case and then a couple
19 days later, they sent something to a boyfriend without
20 coercion, is that relevant? It doesn't seem relevant to me.

21 MS. TIMMERS: It seems relevant to me, if I may
22 interject.

23 THE COURT: Okay. But why does that seem relevant?
24 A person they don't know who is saying whatever he is saying to
25 them versus a person with whom they're in a relationship.

1 MS. TIMMERS: All of this was done virtually and --

2 THE COURT: I agree. I understand.

3 MS. TIMMERS: And so it's -- and so Mr. Jenkins would
4 like to explore with these -- with these complaining witnesses
5 primarily -- he would like to explore, yes, how that they were
6 coerced and what made this different than all the other times
7 they may have sexts. I'm sorry, sent videos or sent videos.
8 Because particularly if some of these young women had been
9 sending sexually explicit photos or sexually explicit videos
10 previously, what made this time different that they felt
11 coerced this time and before they didn't. What was so coercive
12 about it --

13 THE COURT: Isn't that almost exactly the idea that
14 when a woman is raped, the fact that she might have had
15 consensual sex with somebody at another time is totally
16 irrelevant? Isn't that what that is?

17 MS. TIMMERS: But here's -- here is where,
18 unfortunately the rape shield law hasn't caught up with modern
19 technology. Is sexting or the sending of explicit photos or
20 explicit videos, what a lot of -- a lot of sociologists have
21 deemed modern-day adolescent flirting, is that sexual behavior
22 or is that flirting?

23 And, you know, if we're in the context of flirting,
24 or as Ms. Davis said, that originally some of these girls
25 entered into a consensual loose-termed relationship with

1 Mr. Jenkins, we have to explore to be able to differentiate --
2 differentiate if there was actual coercion or if they're saying
3 now that there is coercion because they are embarrassed.
4 There's a difference there. And Mr. Jenkins would like to
5 explore that.

6 THE COURT: I mean, I don't know. I will read the
7 cases I suppose, more details on the facts would be helpful.
8 But it seems to me the corollary is abusing somebody you're not
9 allowed -- I think what the rape shield law would say here is
10 you cannot defend your response to abusing somebody by showing
11 that on another occasion they did something intentionally. It
12 just seems like what it breaks down to.

13 MS. TIMMERS: But here we've got -- oh, sorry, may I?

14 THE COURT: No, that's okay. That's okay.

15 MS. TIMMERS: Here is -- so we look at -- Mr. Jenkins
16 looks at this a little bit differently, rape versus this
17 instance of technological flirting. So with rape, that was an
18 actual physical contact, contact that was happening. And so
19 when Rule 412 was passed by Congress, it was -- yes, the entire
20 purpose was to prevent the alleged rape victim from having to
21 expose her sexual history or even her past sexual dalliances
22 with the alleged sexual perpetrator to the jury and embarrass
23 herself.

24 In this sense, we are talking about -- it's not --
25 we're not in real life, we're in virtuality, so to speak, and

1 in this virtual world, Mr. Jenkins would like this opportunity
2 to -- let me back up. Because you're in a virtual world and
3 you're not -- there's no physical -- you know, there's no gun
4 pointed to your head, there's no knife held to your neck, there
5 isn't, you know -- you know, there isn't any physical threat.
6 It's what makes this different, if you sent sexts last time,
7 you know, previously, what makes this different with the -- I'm
8 sorry, the sexual videos you sent this time. Mr. Jenkins wants
9 to explore that with these --

10 THE COURT: It's a different relationship, I guess.

11 MS. TIMMERS: We don't know. We don't know. We
12 don't know. We won't know until these young women take the
13 stand. Is this just common flirting or are they deeply
14 involved with someone and they're sending these sexually
15 explicit videos and photographs. We just -- we don't know
16 until they tell us.

17 THE COURT: Is coercion an element of the offense?

18 MR JONES: Your Honor, it's -- and the way the
19 indictment is drafted is the defendant did knowing -- knowingly
20 employ, use, persuade, induce, entice or coerce a minor female,
21 so there are multiple ways --

22 THE COURT: Take out the coercion, let's just take
23 out the coercion for a minute.

24 MR JONES: Employ and using --

25 THE COURT: Employ and using makes all of that

1 irrelevant because then the mere fact that he used a minor to
2 produce an image is enough for the conviction, whether or not
3 the minor did it through coercion or whether the minor did it
4 voluntarily, it is really irrelevant to the charge.

5 MS. TIMMERS: But to use a minor, you know, if -- if
6 the minor voluntarily sent the sexually explicit message, how
7 did he use?

8 THE COURT: Because he used the minor to get the
9 photo.

10 MS. TIMMERS: That's what I'm saying, though, but if
11 this --

12 THE COURT: I don't think it means --

13 MR JONES: But that's not a --

14 (Multiple voices overlapping)

15 THE COURT: You're trying to throw force into that.
16 To use the minor or to employ the minor just means that you
17 have the minor who is photographed. I don't think there is any
18 coercion in there. And I would think that if the minor did it
19 with a boyfriend, it's largely the same thing and irrelevant,
20 any difference there.

21 MS. TIMMERS: But what if it wasn't a boyfriend?
22 What if it's just somebody --

23 THE COURT: It's still that guy's -- it's not a
24 defense to him that somebody else victimized her in a different
25 situation. I get your point on coercion, if coercion --

1 because that puts into it the overbearing of what the victim
2 might otherwise want to do, then maybe, therefore, whether or
3 not she does it without a coercive environment could be
4 relevant. But I don't see how, if the charge is simply
5 employing a minor to send you a photo of herself, how the fact
6 that she does that anywhere else, to anybody else at any other
7 time is relevant to your client's defense. What would your
8 argument be later?

9 MS. TIMMERS: Well, I just want to go back to the
10 coercion --

11 THE COURT: No, no, no, no. Let's talk about this.
12 What would your argument be then?

13 MS. TIMMERS: For the use or the employment, you
14 said?

15 THE COURT: Yes. What would you say if you knew that
16 a month later or a month before, this victim sent a photo of
17 herself, a similar photo of herself to somebody else? Every
18 time one of these children is photographed, it's the same
19 victimization. It doesn't matter who takes the picture or who
20 asks for the picture.

21 MS. TIMMERS: Well, if the minor is taking the
22 picture of herself, the minor hasn't victimized themselves. The
23 victimization only occurs when the minor hits send.

24 THE COURT: Well, of course. But that's what he's
25 employing her to do, that's what he's getting her to do, that's

1 what he's inducing her to do. Otherwise --

2 MR JONES: And, Your Honor --

3 THE COURT: -- is she just sending it out randomly,
4 just spamming it out? No. As soon as he asks for it, as soon
5 as he asks for it, you've hit enough, I think at that point, to
6 have using, inducing a minor to do it. I don't think it
7 requires anything more than that.

8 MR JONES: And, Your Honor --

9 THE COURT: Coercion is the extreme.

10 MR JONES: It's not a defense -- that if the victim
11 voluntarily sends something, that is not a defense to the
12 charge. Because it's still using a minor -- I agree with the
13 Court. As soon as he asks for the image, then that's the
14 crime, because he has used a minor to produce a sexually
15 explicit photo.

16 And it's not a defense whether -- how willing the
17 victim might have been to send it, which is I think where
18 Ms. Timmers wants to go with cross-examination.

19 MS. TIMMERS: We want to just explore -- Mr. Jenkins
20 would just like to explore the girls' usage of sending their
21 sexually explicit photos and videos. They were obviously
22 familiar enough with it that when they were interacting with
23 Mr. Jenkins, they were able to be do it. You know, otherwise,
24 Mr. Jenkins can't cross-examine anybody about anything, you
25 know.

1 THE COURT: Sure, he can. He can cross-examine all
2 he wants about why they did what they did with him. All over
3 that, right? Can't he?

4 MS. TIMMERS: Yes.

5 THE COURT: Okay. I mean, he certainly can ask all
6 of those questions. I will look at -- I will look at these
7 cases. I think that Ms. Timmers' strongest argument is on the
8 side of the coercion, because that includes some level of
9 overbearing of will, I think is what coercion is.

10 MS. TIMMERS: And if I may, Your Honor, the summary
11 you're going to be reading to the jury uses the word
12 "coercion," so the jury is going to be thinking coercion.

13 THE COURT: Well, we can change that. That need not
14 guide everything else. I mean, the government -- the
15 government alleged a number of things, and I think they have
16 the right to plead it in the conjunctive and prove it in the
17 disjunctive, so we can change that.

18 I will have to think about this some more and we'll
19 let you know. It troubles me that -- it just seems to me that
20 minors are the victims of this crime. And that trying to put
21 in other evidence of when they were also victimized is really
22 not relevant.

23 But I understand your point, Ms. Timmers, that if his
24 claim is -- is it a defense to this case that they wanted to
25 send him the photos? If they volunteered them, is that a

1 defense? If he said, Hey, do you want to do this? Or they
2 said, Would you like a photo? And he said, Sure. Is that a
3 defense in this case?

4 MR JONES: We have prosecuted those cases,
5 Your Honor, for production of child pornography.

6 THE COURT: Right. I would think every time. Is it
7 the same crime here?

8 MR JONES: It would be the same charge, the same
9 pleading language. It's not a defense that the -- that the
10 minor was willing to send the photograph, that does not relieve
11 a defendant of criminal responsibility.

12 THE COURT: Then what would you ask the jury, did
13 they really feel coerced? I mean, I guess if it's an element
14 of the offense, they have to decide that. But if they had
15 volunteered this and they had brought up the idea, I think it
16 would still be the same crime. I think the law says that
17 these -- if people -- if these victims send something that you
18 get -- well, I guess you could accidentally get it and not
19 commit a crime. But I think otherwise -- at any rate, I will
20 look at those cases on the rape shield law. I do have some
21 difficulty understanding the relevance when we look along the
22 spectrum of employ, use, induce. And maybe employ and use
23 seems to very much reduce the relevancy of this.

24 But as you move across the spectrum of persuade,
25 induce, entice or coerce, maybe you get more into the --

1 relevance becomes more of a -- becomes easier to see and I
2 think that's Ms. Timmers' point.

3 I'll just have to look and see whether there is a
4 basis for applying the rape shield law, because it seems to me
5 as though the fact that he coerced her into doing it, the
6 fact -- I don't know. You're telling me there's something
7 relevant that if she actually has a relationship with a person
8 and she sends a photo to that person, that that somehow is
9 relevant to whether or not your client, whom they've never met
10 in person coerced it? I just don't see the relevance of that.

11 MS. TIMMERS: Well, because this was done virtually,
12 the relevance is what made this time different. If you send it
13 willingly --

14 THE COURT: What makes it different is that it's a
15 different situation. This is a person in real life that she
16 has a real relationship with.

17 MS. TIMMERS: Even more so. And this is a virtual
18 person, so why would you -- or well, virtual person -- I mean,
19 somebody we're talking to virtually, what was the difference?
20 Explain to us why would you send it? So you said --

21 THE COURT: I think you're falling right into the
22 rape shield idea, which is the fact that somebody has sexual
23 relations with somebody else is not relevant to whether or not
24 they consented with this person.

25 MS. TIMMERS: But is this sexual relations? I mean,

1 is this really sexual --

2 THE COURT: I don't know. I don't know.

3 MS. TIMMERS: -- behavior or a sexual predisposition?
4 We argue it's not in our sur-response.

5 THE COURT: I know. I know. Okay. I'll look at the
6 cases. Y'all cited a lot of cases. I will look at those and
7 see what they seem to say. Let's move on though.

8 How much of this stuff are we talking about,
9 Mr. Jones?

10 MR JONES: For -- which stuff?

11 THE COURT: I mean, the --

12 MR JONES: The 404(b)?

13 THE COURT: No, the thing we were just talking about.
14 Is there a lot of that?

15 MR JONES: I'm still unclear about the question. A
16 lot of?

17 THE COURT: Yes. Are there many instances where the
18 victims sent photos at other times to other people?

19 MR JONES: I don't think so, Your Honor. And no.
20 And, again, our focus was what happened here in this case.

21 THE COURT: Yes.

22 MR JONES: And if we would not have a crime really,
23 honestly, a charge, if any victim had -- had said -- you know,
24 if we identified somebody and they said, well, I just already
25 had these photos already on the shelf, so I just sent those to

1 him, because they would not have been produced at a defendant's
2 direction, so I don't think we really have that in play,
3 Your Honor, here.

4 THE COURT: So are we just fighting about
5 hypothetical stuff?

6 MS. DAVIS: Well, I don't think we're fighting about
7 hypotheticals, but I do think that we're actually getting to
8 the heart of what it is the jury is going to be deciding, and
9 that is whether or not Mr. Jenkins participated in the
10 production of these images. And Ms. Timmers is going to be
11 able to ask these victims over and over and over again, each
12 one of them, about Mr. Jenkins' role in producing these images
13 and I think that gets her to where she needs to get without --

14 THE COURT: Except she'd like to push it to the side
15 of employ and use rather than coerce.

16 MS. DAVIS: Or I think we're more on the side of
17 employ and use and she would like to keep it at coercion and
18 sort of get --

19 THE COURT: Okay. Right. Yes. Yes.

20 MS. TIMMERS: Yeah. And I understand that point, but
21 I think she's going to be able to explore with each victim
22 where on the scale their interaction with Mr. Jenkins was.

23 THE COURT: What about their interaction with others?
24 Do we know if there -- it would be helpful to know -- like, for
25 example, I think when you can -- in most other instances when

1 we are ruling about the admissibility of evidence, we kind of
2 know what it is, right?

3 MS. DAVIS: Right.

4 THE COURT: Here we're sort of talking
5 hypothetically, and it might make a difference if it's somebody
6 that a person just met online and had a virtual relationship
7 with and then quickly took photos and shared it, maybe that
8 would be different than somebody that had a relationship with
9 someone, a real relationship, not a virtual relationship.

10 MS. DAVIS: But I think that gets back to what
11 Your Honor was saying before and that is that it doesn't negate
12 Mr. Jenkins' guilt in the production count.

13 THE COURT: It only does insofar as she wants to
14 argue there wasn't coercion.

15 MR JONES: But it doesn't go back to did he employ or
16 use a minor to produce.

17 THE COURT: Right.

18 MR JONES: And that's one what the government -- one
19 of the methods that the government can still use to still
20 employ it, which means that the -- anything else that the
21 victim did doesn't really -- as Ms. Davis was saying doesn't
22 reflect on the defendant's guilt.

23 MS. DAVIS: And we do know that some of these images,
24 you know, were taken under the employ and use, you know, when
25 there was, you know, a way -- what one of our victims would

1 have thought was more of a consensual relationship so we do
2 know that. I mean, Mr. Jones and I, you know, have undergone
3 the different arcs of these interactions with Mr. Jenkins with
4 each one of these victims, and so each one tells a different
5 story, each one had a different sort of interaction with him,
6 and there are multiple ways that each one of these words were
7 used, frankly.

8 THE COURT: Right. But I guess my question, though,
9 is amongst the victims that you anticipate testifying, do we
10 know how many other instances there were with other people that
11 Ms. Timmers might be able to explore?

12 MS. DAVIS: No, at this time Mr. Jones and I do not
13 know that, Your Honor. We did not explore that with the minor
14 victims.

15 MR JONES: I think there was -- just to be clear,
16 there's a possibility with one victim where she doesn't know
17 how after she cut off communications with Mr. Jenkins her --
18 some photos started circulating in her -- like I think among
19 some of her classmates, and that was an area that was unclear
20 whether -- how those photos got out there to her classmates, so
21 if it's possible then that there were others that this one
22 victim took.

23 THE COURT: But she doesn't know how they got out
24 there?

25 MR JONES: She doesn't.

1 THE COURT: Well, that doesn't seem relevant to me if
2 she doesn't know how they got out there.

3 Well, I think maybe it would be helpful if you-all --
4 are you going to explore this with these folks or is this an
5 area that you don't intend to explore with them? I mean, the
6 only reason I ask is because it seems like the defendant should
7 have an opportunity to make a record for appeal at least as
8 to -- and sort of knowing what the depth of it is or the
9 specifics of it might be relevant not only to my decision but
10 to the appeal.

11 MR JONES: Well, we hadn't explored it, Your Honor,
12 because -- for the reason that we were focused on what happened
13 with the charged conduct and we did not want to pry into the
14 victims' -- other aspects of the victims' life.

15 THE COURT: I understand.

16 MR JONES: It was, you know, I think enough for --
17 traumatized -- it was honestly traumatizing for many of them
18 just to have the federal government reach out and contact them
19 and start talking about all of this. We talk about there were
20 more than 100 girls. Agent Greene and a victim assistance
21 specialist at HSI contacted dozens and dozens of girls, and
22 many of them, they were able to confirm this has been their
23 phone number for the last five years, this -- they had been on
24 Kik, this is their Kik user name, screen name, they had been on
25 Facebook, this is their Facebook name, and they had been using

1 all of those like, you know, for four or five years.

2 And then it got to the question of are you aware of
3 Benjamin Jenkins or some of the aliases he used and a lot of
4 them are like no, never heard of him, I have no idea, I can't
5 help you anymore. If denial is their best -- is their best
6 form of dealing with these charges, then we cannot intrude on
7 that. And the -- not with these charges, excuse me, with the
8 incidents that happened, their dealings with Mr. Jenkins, we
9 just can't intrude on that.

10 And that informed our approach of how we dealt with
11 the victims, because we wanted to -- they were cooperating, we
12 wanted to focus on their cooperation for their interactions
13 with Mr. Jenkins. We were not going to go exploring other
14 aspects of their personal life. It's enough that we show up
15 there with -- you know, asking them questions, showing them
16 photos, we did not want to go into other parts of that.

17 So to answer the Court's question, is this something
18 that we planned to explore with the victims before trial, I
19 don't think so. It's -- there's a lot of -- it's victim
20 dignity that we're focused on here, Your Honor.

21 THE COURT: Okay. All right. Thank you. Anything
22 else anybody wants to say about this before we move on?

23 MR JONES: No, Your Honor.

24 THE COURT: Okay. Thank you. The other one is the
25 other 404(b), is that the other issue that we have to talk

1 about?

2 MR JONES: That is. And, Your Honor, I think it's
3 highly unlikely the government would use it. If we could, we
4 would just ask the Court to defer ruling on this for now. If
5 we feel a need that we might need to go into it at trial,
6 depending upon the way the direction of the trial -- how
7 testimony comes in, then we would alert the Court in advance.
8 But I think right now, it's -- as I said, I think it's
9 extremely unlikely that we are going to go into this.

10 We do believe, though, that if Mr. Jenkins testifies,
11 this does present an area where we could cross-examine him
12 about some of the -- what we allege is 404(b) evidence.
13 Whether he was the person who was actually in contact with the
14 minor girl up in Massachusetts, all of that information was
15 turned over, you know, in discovery, with the initial
16 discoveries, that -- the defendant has had all of that
17 information, the police reports and the summary of the chats
18 for over a year now.

19 THE COURT: Ms. Timmers?

20 MS. TIMMERS: Well, defense counsel agrees with
21 Mr. Jones that if Mr. Jenkins should take the stand, then yes,
22 Mr. Jones should be allowed to use the 404(b) evidence, but
23 other than that, Mr. Jenkins would state to this Court is that
24 this particular evidence from Massachusetts, it's cumulative
25 and repetitive and it doesn't prove any additional fact that

1 hasn't already been shown at trial and there wasn't any -- I
2 mean, that's pretty much what he would say, is it's just
3 cumulative and repetitive, everything that's been shown to the
4 jury before, what does this add? It doesn't add anything.

5 THE COURT: Okay. Well, maybe that's why Mr. Jones
6 may decide not to use it. But I will tell you, I found their
7 statement, the government's statement in their pleading on
8 this, which was Document 63, Page 7, it's pretty compelling as
9 to the relevance of it. And so that is the framework that I
10 will be thinking about it in the event this issue comes up at
11 trial. Okay?

12 It does seem to me to show a pattern, it does seem to
13 me that it would show intent, or motive, or preparation if this
14 is a way that he is sort of bringing these girls along, and
15 what you're catching is the early part of the relationship,
16 it's like a river, and what you're catching is just this --
17 before you get all the way downstream to where they're being
18 victimized, I think it would be relevant for all of those
19 purposes that the government cited in its pleading, but we'll
20 see whether -- and that's actually, in fact, a different
21 argument than the cumulative and repetitive. The cumulative
22 and repetitive maybe goes a little bit to 404(b), but it's not
23 a relevancy argument or -- I'm sorry, it maybe goes to
24 prejudice, but it doesn't seem to go to the core of the 404(b).
25 So, at any rate, maybe we won't have to address that issue.

1 Is that the only other pretrial issue that's hanging
2 out there?

3 MR JONES: I believe it is, Your Honor.

4 MS. TIMMERS: Yes, Your Honor.

5 THE COURT: All right. I will look over the next
6 couple of days at this issue of the admissibility or the
7 ability of the defendant to cross-examine these victims as to
8 other times that they might have shared photos.

9 That will be the extent of it. I think that that's
10 the only area of relevance, no matter what happens, no matter
11 what the ruling was, I think that's the only relevance that's
12 been put forward by Ms. Timmers is the idea that if there is
13 evidence that on another occasion with a different person, they
14 provided photos, and there's an allegation that these people
15 were somehow enticed, this particular person, was somehow
16 enticed, induced or something like that to provide them to this
17 defendant, it might possibly be relevant. But anything else
18 about their sexual activity is wholly irrelevant. Anything
19 about other texts they sent that did not involve photos or
20 things that they talked about, any argument that that's
21 relevant, Ms. Timmers?

22 MS. TIMMERS: No.

23 THE COURT: Okay. So I want to make sure that what
24 we're talking about is -- what about it is relevant if the
25 victim does not allege coercion or enticing, just he asked me

1 for them and I did it? Is the fact that she did it somewhere
2 else then relevant?

3 MS. TIMMERS: Well, I would like to explore that
4 issue.

5 THE COURT: Why?

6 MS. TIMMERS: I would.

7 THE COURT: What would it help?

8 MS. TIMMERS: The jury may have -- it may have some
9 bearing on how the jury feels about it.

10 THE COURT: But the jury would be told that what they
11 have to decide is if on this instance with that victim he
12 either used or -- what's the other language? Something before
13 you get down the spectrum, he employed or used.

14 MS. TIMMERS: Well, I understand that, but the jury
15 would have to decide if there was, in fact, use or if there
16 was, in fact -- you know, if he did, in fact, employ. So
17 that's what Mr. Jenkins would like to at least cross-examine on
18 that. You know, what do you mean that I employed you, you
19 know, just --

20 THE COURT: That's not the word they're going to use.

21 MS. TIMMERS: I know. I know.

22 THE COURT: Go ahead.

23 MS. DAVIS: Well, and I think here importantly,
24 Your Honor, you know, Your Honor and the jury, they're going to
25 hear that Mr. Jenkins went about this in multiple different

1 ways. And it wasn't always, you know, coercive in sort of a
2 classic sense of threatening of force or threats. There were
3 times where he was approaching some of these young women as a
4 young woman himself, and so in our argument that the government
5 could make to that, Your Honor, was a way of enticing these
6 girls, pretending to be, you know, 14 like them, pretending to
7 be questioning their sexuality as a young 14-year-old female,
8 the same way maybe they were.

9 There's a lot of different ways of sort of looking at
10 each one of those words, and we shouldn't just be thinking
11 about any sort of violence, a use of knife or whatever
12 Ms. Timmers was talking about before, drawing sort of a
13 distinction between, you know, the rape and what we have here.
14 I don't think that that is really the distinction that we
15 should be looking at.

16 THE COURT: Yes. I understand what you're saying. I
17 appreciate that. Okay. Do you want to say something else?

18 MS. TIMMERS: No.

19 THE COURT: Okay. It's just hard not knowing what
20 else is out there how you can make a decision about the
21 relevance of it, because what you're asking then is to say
22 that -- or maybe I'm just right back to exactly why you bring
23 up the rule you did, that somebody being coerced today with
24 this defendant, the fact that they might have done the same
25 thing without being coerced on another day with another person

1 is not relevant.

2 MS. TIMMERS: I'm saying it is relevant.

3 THE COURT: I know.

4 MS. TIMMERS: Oh, okay.

5 THE COURT: What the government is saying is if
6 that's the basis for the ruling then, it has to be that -- in
7 other words, the government has to essentially take the
8 position that if somebody is claiming that Mr. Jenkins coerced
9 her to send a photo, that the fact that a couple of days later,
10 she sent a similar photo to a friend without any coercion is
11 irrelevant or inadmissible for some other reason.

12 MR JONES: That's correct, Your Honor, we believe it
13 is irrelevant. I mean, just going through the classic -- to
14 the definition of relevance in the rules of evidence, that it
15 puts a fact in dispute more likely or less likely, and I don't
16 think the -- that's the government's position, those types of
17 questions by the defendant about any other type of photos sent
18 do not make the fact undisputed whether he did it more or less
19 likely.

20 THE COURT: Well, except for she would say when it
21 comes to coercion, which is not focused on him, it's focused on
22 how the victim responded or why the victim responded. She
23 would say that that's the relevant part. The person wasn't
24 coerced or threatened or enticed, she just did it freely and
25 voluntarily three days later would be relevant, she says, as to

1 whether they were coerced this time.

2 MR JONES: But that's not where the government is
3 only confined to proving coercion.

4 THE COURT: I know. I get it. Okay.

5 MS. DAVIS: Is Your Honor going to be revisiting the
6 case summary also and the use of the word "coercion"?

7 THE COURT: Yes. I mean, I will change the case
8 summary. That's why we're doing this kind of now. I will
9 revise the case summary and any of it up until the last minute.
10 So I want to make sure that we have -- that the last time we
11 look at it that the case summary is what we want it to say.
12 The only reason to give that to the jury is to let them know
13 what this case is about. I mean, there may be people that when
14 they hear it, they say this is not a case for me. So that's
15 the only reason. So we'll revisit that at any time, same thing
16 with the background and the qualifying questions. Okay?

17 MS. DAVIS: Thank you.

18 THE COURT: All right. If nothing else, we will see
19 you-all on that date for the start of the trial. Thank you.

20 COURTROOM DEPUTY: All rise. Court is adjourned.

21

22 (Whereupon, the proceedings were adjourned at 5:44
23 p.m.)

24

25

REPORTERS CERTIFICATE

I, Jana B. Colter, Official Court Reporter for the United States District Court for the Northern District of Georgia, with offices at Atlanta, do hereby certify:

That I reported on the Stenograph machine the proceedings held in open court on September 17, 2019, in the matter of UNITED STATES OF AMERICA V. BENJAMIN JENKINS, Case No. 1:18-CR-00181-MLB; that said proceedings in connection with the hearing were reduced to typewritten form by me; and that the foregoing transcript (49 Pages) is a true and accurate record of the proceedings.

This the 22nd day of November, 2019.

/s/ Jana B. Colter, FAPR, RMR, CRR, CRC
Official Court Reporter

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA